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Supreme Court, U.S.
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No. 98-1145

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ARTHUR J. BREWSTER,

Petitioner,

vs.

THE BOARD OF EDUCATION OF THE LYNWOOD UNIFIED SCHOOL DISTRICT, AUDREY M. CLARKE, as an individual and in her official capacity, ALTHEA L. JENKINS, as an individual and in her official capacity, GARY D. FURUNO, as an individual and in his official capacity, RICHARD ARMSTRONG, as an individual and in his official capacity, LAURA M. BYRD, as an individual and in her official capacity, RACHEL CHAVEZ, as an individual and in her official capacity, CYNTHIA GREEN-GETER, as an individual and in her official capacity, THELMA CALVIN-WILLIAMS, as an individual and in her official capacity, and DOES 1-50, INCLUSIVE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals for the Ninth Circuit correctly determined that Respondents are entitled to qualified immunity against Petitioner's claim that he suffered retaliation in his employment as a public school teacher for engaging in work-related speech, where the speech in question was disruptive of close working relationships, false, and interfered with Petitioner's performance of his own duties, and where, in light of these considerations, Petitioner's speech did not clearly enjoy any First Amendment protection under the particularized, factually-sensitive balancing of factors first articulated by this Court in *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

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STATEMENT OF THE CASE

The Lynwood Unified School District (hereinafter "District") hired Petitioner Arthur J. Brewster as a probationary teacher at Will Rogers Elementary School in or about September of 1994. (CR 24, ER7, Decl. of Furuno 2:10-25.)[1] Pursuant to California Education Code Section 44929.21, California public school districts may choose not to retain, or "non-reelect," first- or second-year probationary teachers for the following school year by giving notice on or before March 15 of this decision. Probationary teachers have no right to continued employment, and are subject to non-reelection without cause, without a hearing, and without any statement of reasons. *Board of Educ. of the Round Valley Unified Sch. Dist. v. Round Valley Teachers Ass'n*, 13 Cal. 4th 269, 277-79, 52 Cal. Rptr. 2d 115, 120-21 (1996).

Shortly after Petitioner began teaching, Respondent Gary D. Furuno, Principal of Will Rogers Elementary, became aware of several deficiencies in Petitioner's teaching, based on his own observations, as well as on complaints from parents, teachers, and staff members. (CR 24, ER 7, Furuno 3:8-4:13.) On December 1, 1994, Furuno issued a memorandum to Petitioner describing specific deficiencies in Petitioner's job performance. (CR 36, ER 12, Plaintiff's Statement of Genuine Issues in Opposition to Motion for Summary Judgment, hereafter "SGI," ¶ 124.) On December 6, 1994, Petitioner alleged to Furuno for the first time that he (Petitioner) perceived that an error had been made in the calculation of daily attendance records for Petitioner's classroom. (CR24, ER7, Decl. of Furuno 11:24-12:3.) In fact, Petitioner had himself repeatedly failed to turn in his own attendance registers on a

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1. Citations to the record will contain a reference to the Clerk's Record and to the Excerpts of Record, as well as the title of the document cited.

daily basis and to follow up on obtaining verifications of student absences, as is required of every teacher. Petitioner consistently failed to comply with these requirements of his job, despite repeated requests from clerical staff. Petitioner's attendance taking was not accurate or very neatly done. Furuno found that Petitioner's allegations and conduct in this regard were damaging to the morale of the clerical employees, disruptive of the close working relationship required between teacher and principal, and were an apparent attempt to cover up Petitioner's own performance deficiencies. (CR 24, ER 7, Furuno 12:4-16.)

Petitioner presented the attendance accounting issue to Furuno as one of error and not of fraud or falsification. (CR36, ER12, SGI ¶ 127.) Furuno responded by telling Petitioner that he would review his concerns with the school secretary to see whether, in fact, any errors had been made. Furuno reviewed each step in the attendance accounting process with the school secretary to make sure that there was no misunderstanding and that correct procedures were being followed. Furuno also reviewed Petitioner's classroom attendance register and found no errors in the calculation of attendance. (CR24, ER 7, Decl. of Furuno 12:17-28; CR36, ER 12, SGI ¶ 127.) A subsequent audit of the District's attendance records revealed no significant errors in attendance accounting procedures either at Will Rogers Elementary or within the District as a whole. (CR 28, ER 9, Decl. of Islam 2:9-18.)

On February 28, 1995, pursuant to Furuno's recommendation, the District's Board of Education voted to nonreelect Petitioner. Although Petitioner's nonreelection required Board action, the decision was effectively Furuno's alone. (Petitioner's Appendix B, p. 41a.)

Petitioner subsequently filed suit pursuant to 42 U.S.C. § 1983, alleging, *inter alia*, that his First Amendment rights

were violated because his nonreelection was motivated by his speech regarding the attendance accounting issue, as well as by Petitioner's activities as a union grievance representative. Respondents, who deny that Petitioner's speech was a motivating factor in his nonreelection[2], moved for summary judgment on grounds of qualified immunity. The District Court for the Central District of California granted the motion in part and denied it in part, ruling that while Petitioner's activities as a union grievance representative did not constitute speech protected by the First Amendment, Petitioner's speech regarding attendance accounting was protected by the First Amendment as a matter of clearly established law. (Petitioner's Appendix B, pp. 47a-49a, 57a.) Respondents appealed the District Court's ruling insofar as it denied qualified immunity. The Court of Appeals for the Ninth Circuit reversed, and subsequently denied rehearing and rejected Petitioner's suggestion for rehearing en banc. (Petitioner's Appendix A, p. 32a; Petitioner's Appendix D, p. 63a.) The present petition for writ of certiorari followed.

REASONS FOR DENYING THE WRIT

The Ninth Circuit correctly ruled that Respondents are entitled to qualified immunity because Petitioner's speech regarding alleged errors in attendance accounting was not protected by the First Amendment as a matter of clearly established law. Furthermore, the Ninth Circuit's holding is consistent with the decisions of this Court and the decisions of every sister Circuit that has specifically considered the issue of the application of the qualified immunity doctrine to claims of First Amendment retaliation in the public employment context. Therefore, the petition should be denied.

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2. Respondents conceded for purposes of their appeal only that Plaintiff's speech on the attendance accounting issue was a motivating factor in his non-reelection. (*See* Petitioner's Appendix A, p. 11a.)

A public official is entitled to qualified immunity from personal liability under 42 U.S.C. § 1983 unless that official's conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 500, 514, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). Moreover, the law must be clearly established in a "particularized" sense. For the law to be clearly established to the point that qualified immunity does not apply, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987).

Public employees such as Petitioner have only limited First Amendment rights in the context of their employment. Only that speech which relates to matters of public concern is protected in the public employment context. *Connick v. Meyers*, 461 U.S. 138, 146-49, 103 S. Ct. 1684, 1690-91, 75 L. Ed. 2d 708 (1984). If the speech is on a matter of public concern, this Court requires a balancing of the

> interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees,

in order to determine whether the First Amendment protects the speech. *Id.* at 142, 103 S. Ct. at 1687 (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35, 20 L. Ed. 2d 811 (1968)). The outcome of this balance turns largely on the precise context in which the speech at issue occurs, and "the states's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick*, 461 U.S. at 150, 103 S. Ct. at 1691-92.

In striking this balance, this Court has recognized that public officials retain

> wide discretion and control over the management of [their] personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.

Id., 461 U.S. at 151, 103 S. Ct. at 1692. Furthermore, this Court has held that public employers' "reasonable predictions of disruption" are entitled to substantial deference. *Waters v. Churchill*, 511 U.S. 661, 673, 114 S. Ct. 1878, 1887, 128 L. Ed. 2d 686 (1994).

Thus, as stated by the Ninth Circuit in its decision:

> whether or not [Petitioner] enjoyed a clearly established right to speak depends upon the sensitive *ad hoc* balancing that *Pickering* entails. The issue the court must decide is whether the outcome of the *Pickering* balance so clearly favored [Petitioner] that it would have been patently unreasonable for the school officials to conclude that the First Amendment did not protect his speech.

(Petitioner's Appendix A, p. 16a.) Weighing the relative interests of the District and of Petitioner in light of factors identified by courts that have applied the Pickering analysis, the Ninth Circuit properly concluded that, while there were considerations on both sides of the balance, numerous factors weighed in favor of the District's interest in taking action against Petitioner for the disruptive manner in which he raised the issue of the accuracy of the District's student attendance record keeping. These include Petitioner's disruption of

harmony among co-workers, the nature of the principal-teacher relationship, which Petitioner conceded is a close working relationship that requires trust and respect, the extent to which Petitioner's speech interfered with the fulfillment of his own duties, the fact that Petitioner's speech was directed to a colleague rather than to the public or the media, and the fact that Petitioner's allegations were ultimately determined to be false. In light of these factors, the Ninth Circuit concluded that Respondents were entitled to qualified immunity. (Petitioner's Appendix A, pp. 14a-20a.)

This determination is consistent with this Court's requirement that qualified immunity analysis be conducted in a "particularized" manner, with consideration given to the specific factual circumstances in which a violation of federal rights is alleged to have occurred. *Anderson*, *supra*. Additionally, the Ninth Circuit's decision is in accord with decisions addressing similar issues by the First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits. All of these circuits, like the Ninth Circuit, have recognized that the inherently fact-sensitive nature of the *Pickering* balance will often preclude a determination that an employee's speech was clearly protected by the First Amendment. *See Kincade v. City of Blue Springs*, 64 F.3d 389, 398 (8th Cir. 1995), *cert. denied*, 517 U.S. 1166, 116 S. Ct. 1565, 134 L. Ed. 2d 665 (1996); *Di Meglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995); *O'Connor v. Steeves*, 994 F.2d 905, 917 n.11 (1st Cir. 1993), *cert. denied*, 510 U.S. 1024, 114 S. Ct. 634, 126 L. Ed. 2d 593 (1993); *Guerico v. Brody*, 911 F.2d 1179, 1183-85 (6th Cir. 1990), *cert. denied*, 500 U.S. 904, 111 S. Ct. 1681, 114 L. Ed. 2d 76 (1991); *Melton v. City of Oklahoma City*, 879 F.2d 706, 729 (10th Cir. 1989), *modified on other grounds*, 928 F.2d 920 (1991) (en banc), *cert. denied*, 502 U.S. 906, 112 S. Ct. 297, 116 L. Ed. 2d 241 (1991); *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989); *Noyola v. Texas*

Dep't of Human Resources, 846 F.2d 1021, 1025 (5th Cir. 1988); *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1986), *cert. denied*, 479 U.S. 848, 107 S. Ct. 172, 93 L. Ed. 2d 109 (1986).

Petitioner himself concedes that the Ninth Circuit employs an

> extremely fact-intensive balancing test [under which] the law of protected speech . . . can almost never become clearly established, because the specific facts of one situation will always differ slightly from the specific facts of any other situation.

(Petition at p. 8.) Given that this is so, there can be no question that Respondents are entitled to qualified immunity.

Petitioner argues that this Court should grant the writ because the Ninth Circuit improperly conducted the *Pickering* balancing and gave insufficient weight to the declaration of JoAnne Perkins. First, this Court's rules clearly provide that an asserted misapplication of a properly stated rule of law rarely constitutes grounds for granting a writ of certiorari, and Petitioner presents no argument in favor of departure from this general rule.

Second, the Perkins declaration does not tip the *Pickering* balance in Petitioner's favor. As noted above, it was Furuno who made the recommendation for Petitioner's nonreelection, and the District Court determined for purposes of summary judgment that the decision to nonreelect Petitioner was effectively Furuno's alone. Petitioner does not contend, and nothing in the record suggests, that Furuno had any awareness of the facts alleged in the Perkins declaration. Therefore, these facts are irrelevant to the question of whether Furuno reasonably

could have concluded that the First Amendment did not protect Petitioner's speech regarding the attendance records for the classes that Petitioner taught at Will Rogers Elementary. Third, even if the Perkins declaration did tip the *Pickering* balance in Petitioner's favor, this would go only to the merits of Petitioner's First Amendment claim and would not alter the outcome of the pertinent question of qualified immunity.

Petitioner, in urging this Court to grant the petition, inaccurately characterizes the effect of the Ninth Circuit's holding. Petitioner would have this Court believe that the Ninth Circuit's decision, if allowed to stand, would constitute a death knell for public employees' First Amendment rights. This is false. The Ninth Circuit's decision relates only to qualified immunity and has no effect on the liability of public employers. All that the Ninth Circuit has done is to ensure that individual public officials may continue to ensure the efficiency of the governmental enterprises for which they are responsible, including, where necessary, by taking action to discipline or terminate employees based on reasonable predictions of disruption, without fear of personal liability.

Where, as in this case, a public official is confronted with evidence that a public employee has falsely criticized colleagues and undermined close working relationships, all over a policy with which the employee himself has in the past failed to comply, that public official must be free to correct the problem. To require a public official to accurately predict how a court will balance the *Pickering* factors, viewing the situation after the fact, at the risk of personal financial peril, is to deny that public official the ability to manage [effectively] the employees under his supervision.

CONCLUSION

For all the foregoing reasons, Respondents respectfully urge that the petition for a writ of certiorari be denied.

Respectfully submitted,

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